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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL MARTINEZ,

Defendant and Appellant.

E068597

(Super.Ct.No. FSB1503926)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Raul Martinez, of attempted murder and assault with a deadly weapon. (Pen. Code, §§ 187, subd. (a), 245, subd. (a)(1), 664.)¹ The jury also found defendant had committed the attempted murder willfully, deliberately, and with premeditation; he had personally inflicted great bodily injury on his victim; and he had committed his offenses for the benefit of or in association with a criminal street gang. (§§ 186.22, subd. (b)(1), 189, 664, 12022.7, subd. (a).) With the addition of enhancements for a prior strike and a prior serious felony (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)), the court sentenced defendant to life in prison with the possibility of parole, plus an aggregate determinate term of 18 years.

On appeal, defendant challenges the sufficiency of the evidence supporting (1) the implied finding that he acted with intent to kill, and (2) the finding that he acted for the benefit of a gang. He also asserts that he should benefit from a change in the law, effective January 1, 2019, that gives the trial court discretion to dismiss or strike the enhancement for a prior serious felony conviction. (Sen. Bill No. 1393 (2017-2018 Reg. Sess. (S.B. 1393).) We hold substantial evidence supports both challenged findings, but agree with defendant regarding the sentencing enhancement. We thus remand for resentencing but affirm the judgment in all other respects.

¹ Undesignated statutory references are to the Penal Code.

II. FACTS

A. *The Stabbing*

One morning in November 2015, around 8:00 a.m., defendant's father picked him up from a friend's house. Defendant's two sisters were also in the car. He asked his father to stop at a liquor store and went inside while his family waited in the car. Defendant asked the store owner, who was working the cash register, if he could have a pack of cigarettes and pay her the next day. She said no, and defendant left. His family drove home (about a three-minute drive away), and he stayed in the liquor store parking lot.

Shortly after defendant left the store, Steve Handley came in and purchased a pack of cigarettes. Handley was familiar to the store owner as a regular customer. The owner described Handley as being "a little off" mentally or "kind of slow." Handley told the owner that he was scared. He appeared to interact with defendant before entering the store.

After Handley bought his cigarettes and left the store, defendant asked him for a cigarette. He noticed defendant had tattoos on his arm, but he did not know what they were. Handley said no to defendant's request and waited while defendant walked across the street. He tried to keep his distance from defendant "a little bit just because . . . things happening because it's the ghetto." And he was "keeping an eye on" defendant because he looked like he was a "gangbanger or something." Handley thought defendant might be a gang member because of his "demeanor." When the prosecutor asked what Handley

meant by demeanor, he replied: “He had these tattoos and he act like—wow, I don’t know how to answer that question. I don’t want to offend anyone, but it looked like he was trouble—bad news—like he was gonna do something. He’s not necessarily somebody you want—somebody you’d want to keep your distance away from, okay?”

Handley eventually walked away from the store, and defendant approached him again and asked for a cigarette. Handley again refused. Defendant looked angry and closed in on Handley while making bear-hug-type motions with his hands. Handley exclaimed, ““What are you doing, man?,”” then noticed defendant pull a knife on him. (Later, Handley testified that he did not see a knife in defendant’s hand.) Defendant stabbed Handley at least seven times and then took off running. Handley was wearing a leather jacket and did not realize he had been stabbed until defendant ran.

Defendant arrived home about 15 minutes after his family. He tried to talk to his sister, but she had headphones on and was listening to loud music, and all she caught was ““stabbing”” and ““someone.”” She had seen him talking to Handley before they left the liquor store, and he “looked like he was gonna start something.” It was typical of him to start problems for no reason. He usually carried a knife with him.

Deputy Daniel Jessup saw Handley on the street. He appeared to have blood on his shirt. Handley told the deputy he had been stabbed and described his assailant to the deputy. He also said the assailant’s knife was like the deputy’s knife—an approximately three-inch blade with a four-inch handle. Handley admitted that he was angry and cursing because he had just been stabbed and “almost got killed.” Deputy Jessup told

another deputy that Handley was “talking shit” to him and called Handley “a fucking whack.” He also told another deputy that Handley had ““a lot of little pokes on him.”” One of the responding firefighters believed Handley’s wounds did not penetrate very deeply.

After talking to Handley, Deputy Jessup interviewed the liquor store owner, who showed him the store’s surveillance video of defendant. The deputy canvassed the area for the car that had dropped defendant off at the store. He found the car at an apartment complex in the area. The manager of the complex identified defendant from a still photograph of the surveillance footage and said he lived in the complex with his father. The deputy found defendant at the apartment and arrested him. He also found a knife in the kitchen drawer that appeared to have dried blood on it.

An ambulance took Handley from the scene of the stabbing to the hospital. He had a punctured lung and immediately went into surgery, and he stayed in the hospital for approximately two weeks. All his stab wounds were on his torso—at least one on the center of his chest near his sternum, some on his shoulder, and some on his back.

B. Gang Evidence

Deputy Michael Madril was the prosecution’s gang expert. West Side Verdugo, or WSV, is a street gang that originated in west San Bernardino and has expanded into surrounding areas, including Highland. WSV is now the most prevalent street gang in the Highland area. The liquor store is technically a San Bernardino address, but it is

patrolled by Highland authorities, being on the border of Highland and San Bernardino. There was WSV graffiti all over Highland and in the area of the liquor store in this case.

One of the five cliques within WSV is the Mount Vernon gang, or MVG. All the cliques within WSV use the WSV sign. The gang's primary purpose is to commit criminal offenses, including unlawful firearm possession, theft, drug sales, assault, battery, murder, and attempted murder. In 2014, Deputy Madril investigated an active WSV member also from the MVG clique, leading to the gang member's conviction for unlawful possession of a firearm with a gang enhancement. In 2013, another WSV member was convicted of attempted murder (again, with a gang enhancement) at the same liquor store involved in this case.

The deputy opined that defendant was an active WSV member. In 2010, defendant identified himself to an officer as a member of WSV, and specifically the MVG clique. In 2014, he pled guilty to unlawful possession of a firearm with a gang enhancement. His gang moniker is "Travieso," or "Trouble." A bed frame in the apartment was tagged with "Travieso" and "West Side." He has a large "I" tattooed on one arm and a large "E" tattooed on the other, representing the Inland Empire, the geographical area from which WSV hails. He also has "WSV" tattooed on his knuckles (a single letter on each of three knuckles). Generally, visible tattoos on a gang member, such as those on defendant's hands, show that the member has put in work for the gang and demonstrates allegiance to the gang.

In response to a hypothetical based on the facts of this case, Deputy Madril opined that the stabbing of the victim was “street terrorism.” He concluded the incident was about respect, the gang member’s reputation, and instilling fear of the gang in the community. Respect is “everything” to a gang member. Gang culture says that if a gang member is disrespected, it is to be met with immediate violence. It does not matter what the gang member is asking for; the gang member wants to show he or she is in charge. The deputy explained: “It’s nothing but a benefit for them to do this. I mean, it’s over a cigarette. Why would—why would you stab somebody over a cigarette except for the fact that you have a gang member demanding one and it wasn’t provided on demand?” The deputy also opined that gangs benefit from instilling fear in the community insofar as community members will be hesitant to be witnesses against them, which allows the gangs to freely conduct their criminal activities. Community members will be afraid to testify or even report crimes.

III. STANDARD OF REVIEW

In evaluating claims of insufficient evidence, “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the

circumstances might also reasonably be reconciled with a contrary finding.” (*Ibid.*) We neither reweigh evidence nor reevaluate credibility in conducting our review. (*Ibid.*)

IV. DISCUSSION

A. Substantial Evidence Supports the Implied Finding That Defendant Had the Intent to Kill

To convict a defendant of attempted murder, the People must prove the defendant harbored the intent to kill. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) Defendant challenges the sufficiency of the evidence supporting the jury’s implied finding that he intended to kill Handley. We reject this claim.

“Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact could have found” the intent to kill. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) Direct evidence of the defendant’s intent is rare. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) “One who intentionally attempts to kill another does not often declare his state of mind” (*People v. Lashley, supra*, at p. 945.) The jury may infer the intent to kill from the defendant’s acts and the circumstances of the crime. (*People v. Avila, supra*, 46 Cal.4th at p. 701.) The degree of the victim’s injury is not dispositive of the defendant’s intent. (*Id.* at p. 702.) “Indeed, a defendant may properly be convicted of attempted murder when no injury results.” (*Ibid.*)

The People presented substantial evidence that defendant intended to kill Handley in this case. Handley did not provoke defendant's attack and there was no evidence he was armed. He was a defenseless victim. Defendant stabbed him seven times with a three-inch blade while targeting his torso, where vital organs are located. One of these stab wounds was in the center of Handley's chest, and another punctured Handley's lung, requiring surgery and a two-week hospital stay. The jurors could easily and rationally infer from the manner of the attack and the number and location of the stab wounds that defendant intended to kill Handley. (See, e.g., *People v. Avila*, *supra*, 46 Cal.4th at pp. 686, 701-702 [intent to kill supported by substantial evidence where the defendant repeatedly attempted to stab the victim, who was unarmed and trapped inside a car, and the defendant landed two stabs, one severing the bicep muscle and one cutting the leg]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 ["[A]ppellant's intent [to kill] was established by the evidence of his unprovoked attack that rendered the unarmed victim prone and defenseless as appellant repeatedly stabbed him with a shank he had hidden in his boxers."].)

Defendant's arguments to the contrary do not persuade us. He argues there was a lack of substantial evidence because the prosecution did not call any medical personnel or introduce Handley's medical records; Deputy Jessup described the wounds as "little pokes"; one of the firefighters did not believe the wounds penetrated very deeply; defendant stabbed Handley through his leather jacket; Handley never fell down; and defendant left the scene before Handley realized he had been stabbed. First, to the extent

he is suggesting Handley's wounds were not serious, the seriousness of the victim's wounds is not dispositive of intent to kill. (*People v. Avila, supra*, 46 Cal.4th at p. 702.) The victim need not have an injury at all. (*Ibid.*) Second, in citing these facts over other evidence—such as the photographs of Handley's wounds and his testimony about the number, location, and severity of the wounds—defendant essentially asks us to reweigh the evidence. Our standard of review does not allow for such action. The fact that the evidence might reasonably be reconciled with a finding contrary to the jury's does not signify a lack of substantial evidence. The jury could have reasonably found Handley's injuries were serious, requiring a two-week hospitalization for a punctured lung. The question is whether *any* rational jury could have found the intent to kill on this record. The answer to that is a resounding “yes.”

Similarly, we cannot reevaluate Handley's credibility, as defendant would have us. Defendant contends Handley's credibility was “questionable,” citing his inconsistent testimony and his purported mental deficit. For instance, Handley said he both saw defendant pull a knife and did not see the knife, and he was described as being a “little off” mentally and a “whack.” It was the jury's province to weigh Handley's credibility, not ours. Defendant's questions about his credibility on appeal do not permit us to disregard his testimony and find a lack of substantial evidence.

B. Substantial Evidence Supports the Findings That Defendant Acted for the Benefit of a Gang

The California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.) sets forth an enhanced sentence for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) This enhancement has two prongs—the “gang related” prong, and the specific intent prong. (*People v. Albillar* (2010) 51 Cal.4th 47, 60, 65.) Defendant challenges the sufficiency of the evidence on the first prong, requiring that he committed the offenses for the benefit of, at the direction of, or in association with a gang. He asserts there was nothing but speculation and conjecture to support the conclusion that he stabbed Handley for the benefit of a gang. We disagree.

The record discloses substantial evidence that defendant acted for the benefit of WSV. His membership in WSV, and the MVG clique in particular, was well established by his admission of membership to law enforcement, the “WSV” tattoo on his knuckles, and the tagging of his moniker and “West Side” on the bed in his apartment. Defendant publicly and violently attacked Handley in WSV’s expanded territory while sporting a visible gang tattoo on his hand. Handley noticed defendant’s tattoos, and although he could not say what they were, he believed defendant was a gang member based in part on the tattoos. Deputy Madril explained how gangs benefit from instilling fear in the community and showing they are in charge by answering any slight sign of disrespect

with violence. This allows them to intimidate potential witnesses in the community and thus more freely commit criminal offenses. Defendant's wildly disproportionate reaction to Handley denying him a cigarette fit the expert's description precisely. The jury could have reasonably inferred from all this evidence that defendant acted for the benefit of WSV by stabbing Handley for a trivial slight, thereby enhancing WSV's reputation for violence and instilling fear in the community of the gang's territory. In the face of such evidence, we cannot conclude the jury erred. (See *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261 [gang members' severe beating of victim in a public place in gang territory benefitted the gang by promoting fear in the community].) Even if a different jury might have reasonably reached the opposite conclusion, we cannot reverse unless ““upon no hypothesis whatever is there sufficient substantial evidence to support”” this jury's finding. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) That is simply not the case here.

Defendant's reliance on *People v. Ochoa* (2009) 179 Cal.App.4th 650 to argue otherwise is misplaced. In *Ochoa*, a panel of this court recognized that “[a] gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] ‘[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.’” (*Id.* at p. 657.) The *Ochoa* court held the gang expert's opinion that the crimes benefitted the defendant's gang lacked adequate factual underpinnings, where the

defendant “did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing” the offense. (*Id.* at p. 662.) In addition, the defendant had no visible tattoos claiming his gang, there was no evidence the crimes occurred in the gang’s territory or a rival’s territory, the victim was not a gang rival, and the defendant was not accompanied by fellow gang members. (*Id.* at pp. 654, 662.) Here, by contrast, the evidence established defendant had visible gang tattoos on his hand, Handley saw his tattoos and believed he was a gang member, and defendant stabbed Handley in WSV territory. As well, one could reasonably infer from the senseless nature of the stabbing that defendant’s motive for the attack was to promote the gang’s reputation for violence. The *Ochoa* defendant first demanded money from his victim and then carjacked him, a crime that could have benefitted the defendant as an individual by giving him an object of value. (*Id.* at p. 653.) In this case, it is hard to see what value there was in stabbing a man who refused defendant a cigarette, independent of the gang’s reputation. The jury’s finding that the offenses benefitted the gang therefore had adequate evidentiary support, and our *Ochoa* decision does not help defendant.

C. *S.B. 1393 Requires Remand for Resentencing*

The Governor signed S.B. 1393 on September 30, 2018, amending sections 667, subdivision (a) and 1385, subdivision (b). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*)). The new amendments take effect on January 1, 2019, and allow the court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) “Under the current versions of

these statutes, the court is required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ [citation], and the court has no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’” (*Garcia, supra*, at p. 971].) Defendant has filed a supplemental brief arguing he is entitled to the benefit of S.B. 1393 because the judgment of conviction will not be final on the effective date of the amendments. We agree.

This court recently decided this same issue in *Garcia*. As laid out in *Garcia*, the Legislature intended S.B. 1393 to apply retroactively to all cases not yet final on the effective date. (*Garcia, supra*, 28 Cal.App.5th at pp. 972-973.) Defendant’s case will not be final on January 1, 2019, even if no petition for rehearing or no petition for review is filed. The trial court will receive the remittitur from this court after January 1, 2019. (Cal. Rules of Court, rules 8.366(b)(1) [decision becomes final in the Court of Appeal 30 days after filing], 8.512(c)(1) [when no petition for review filed, on its own motion, Supreme Court may grant review of a decision within 30 days after the decision becomes final in the Court of Appeal], 8.272(b)(1) [appellate clerk should issue remittitur after the period for granting review in Supreme Court expires].) We therefore remand for the court to exercise its newly granted discretion to strike or dismiss defendant’s prior serious felony conviction for sentencing purposes. (*Garcia, supra*, at pp. 973-974.) We express no opinion on how the court should exercise that discretion and conclude only that it is the trial court’s prerogative to exercise that discretion in the first instance.

V. DISPOSITION

The matter is remanded to the trial court for resentencing pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393, effective January 1, 2019. In all other respects, the judgment is affirmed.

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FIELDS
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.